

## **Exhibit 3**

**SOILWORKS VS. MIDWEST INDUSTRIAL**

**CHAD FALKENBERG, VOL. I**

**4/09/08**

**LEA, SHERMAN & HABESKI**

**PHOENIX, AZ (602)257-8514**

## SOILWORKS VS. MIDWEST INDUSTRIAL

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SOILWORKS, LLC, an Arizona  
corporation,

Plaintiff/Counterdefendant,

vs.

NO. 2:06-CV-02141-DGC

MIDWEST INDUSTRIAL SUPPLY,  
INC., an Ohio corporation  
authorized to do business  
in Arizona,

Defendant/Counterclaimant.

Phoenix, Arizona  
April 9, 2008  
9:00 a.m.

C O N F I D E N T I A L

DEPOSITION OF CHAD FALKENBERG

SOILWORKS, LLC 30(b)(6)

(VOLUME I, Pages 1 - 229)

LEA, SHERMAN & HABESKI  
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Certified Reporter  
Certificate No. 50320

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I N D E X

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DEPOSITION OF CHAD FALKENBERG,

taken at 9:09 a.m., on April 9, 2008, at the law  
offices of Jones, Skelton & Hochuli, 2901 North Central  
Avenue, Suite 800, Phoenix, Arizona, before LINDA  
BLACKMON, RPR/RMR, a Certified Reporter in the State of  
Arizona.

## APPEARANCES:

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For the Defendant/Counterclaimant:  
Brouse McDowell  
BY JOHN M. SKERIOTIS, ESQ.  
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Akron, Ohio 44311-4407  
330-535-5711

Also Present:  
Robert Vitale

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1 A. I cannot think of anything right now.  
 2 Q. The next paragraph, Paragraph 10, talks about  
 3 Midwest's conduct is intended to cause mistake,  
 4 deception, and consumer confusion. What conduct has  
 5 caused mistake, deception and consumer confusion?  
 6 A. Let's go back to both the letter that Bob  
 7 wrote to Polar Supply and their marketing materials  
 8 about Soilworks being an imitator, both of those would  
 9 fit the bill for No. 10.  
 10 Q. The letter to Polar Supply you believe causes  
 11 what, mistakes, deception and confusion or just one of  
 12 the three?  
 13 A. Well, it could be multiple, but I would say  
 14 the one that jumps out would certainly be confusion.  
 15 Q. Confusion as to how, as to what?  
 16 A. Polar Supply didn't know if it was true or not  
 17 and if they were going to be liable or sued if they  
 18 used our products or sold our products. They were  
 19 scared.  
 20 Q. But that didn't cause confusion between any  
 21 product of Soilworks and any product of Midwest, did  
 22 it?  
 23 A. I think I understand what you're saying is the  
 24 letter itself didn't cause confusion between the two  
 25 product lines?

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1 Q. Correct.  
 2 A. In that case I don't think so.  
 3 Q. Is Polar Supply a current distributor?  
 4 A. Yes, they are.  
 5 Q. Under Spendar Builder Supply though, correct?  
 6 A. I believe so.  
 7 Q. Have they ever ceased being a distributor of  
 8 Soilworks?  
 9 A. I would like to say that they would not  
 10 purchase from us until -- until we gave them  
 11 indemnification and protected them they ceased to do  
 12 business with us.  
 13 Q. What indemnification have you given to them?  
 14 A. I would have to refer to Scott on what all was  
 15 provided, I don't know all the details of what you are  
 16 looking for.  
 17 Q. Have you given them something other than a  
 18 letter indicating that you would indemnify them should  
 19 they get sued for selling your product?  
 20 A. It was something to that effect I believe.  
 21 Q. Have you given them any money, have you paid  
 22 them anything?  
 23 A. I don't understand.  
 24 Q. Have you paid Polar Supply any money as an  
 25 indemnification yet?

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1 A. I wouldn't know. I am not aware of anything  
 2 but that doesn't mean that it hasn't happened.  
 3 Q. Who would know?  
 4 A. I would think our books would show it.  
 5 Q. Back to the initial question. Has Polar  
 6 Supply ever ceased being a distributor with Soilworks?  
 7 A. Not to my knowledge.  
 8 Q. Have they ever indicated to you they are not  
 9 selling your product?  
 10 A. During the period from the time Bob sent the  
 11 letter to the time we provided them indemnification I  
 12 don't believe there was any transactions that took  
 13 place and I believe it was because of the letter.  
 14 Q. Did they miss a bid or a sale in that time  
 15 period that you know of?  
 16 A. Actually, yes, I think so.  
 17 Q. Which one?  
 18 A. I believe it was another ADOT-related project  
 19 or an airport-related project. There were several.  
 20 Q. Do you know specifically which airport?  
 21 A. No.  
 22 Q. Do you have a date by which they would have  
 23 missed something?  
 24 A. No.  
 25 Q. Do you have any information whatsoever to

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1 identify the instance you are saying they missed  
 2 because of this letter?  
 3 A. Not the firm details you are looking for, no.  
 4 Q. I am looking for any detail. By the way, all  
 5 you have told me is that there may be an airport but  
 6 you don't know of any, correct?  
 7 A. I think you would be best off when you depose  
 8 Polar that they would have the closest information  
 9 relating to those projects.  
 10 Q. Do you know what irreparable harm has been  
 11 caused by Midwest against Soilworks?  
 12 MR. DOSEK: Object to the form.  
 13 A. I don't know.  
 14 Q. BY MR. SKERIOTIS: Do you know what  
 15 "irreparable harm" is?  
 16 A. I have an idea.  
 17 Q. I will represent to you that when I use that  
 18 term I mean harm that can't be repaired monetarily. So  
 19 with that definition what irreparable harm is Midwest  
 20 causing to Soilworks?  
 21 MR. DOSEK: Same objection.  
 22 A. I don't know.  
 23 Q. BY MR. SKERIOTIS: With respect to  
 24 Paragraph 12, Paragraph 12 states "Midwest  
 25 intentionally has misrepresented the scope of said

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1 that when we get finished with this would be an  
2 appropriate time, but given the amount of time we have  
3 spent on it so far it seems logical to me that you have  
4 got another hour or so to deal with this particular  
5 exhibit.  
6 MR. SKERIOTIS: I may have but right now  
7 I would like to go through it.  
8 THE WITNESS: It is 12:30 and it would be  
9 nice to get lunch.  
10 MR. SKERIOTIS: I don't have a problem  
11 with that.  
12 THE WITNESS: I had to get up at 5:00  
13 just to be here on time because of traffic.  
14 MR. SKERIOTIS: I understand that and  
15 that's fine, but we will take a break after Count IV.  
16 I won't get to Count V or VI, how about that?  
17 MR. DOSEK: All right.  
18 Q. BY MR. SKERIOTIS: With respect to Count IV on  
19 Page 5 it's called Tortious Interference With Business  
20 Relationship and Expectancy. Paragraph 29 talks about  
21 Midwest knows of Soilworks' business relationships and  
22 expectancies and without justification intentionally  
23 interfered with existing business relationships and has  
24 sought to frustrate Soilworks' expected customer  
25 relationships. Do you see that?

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1 A. Yes.  
2 Q. Is the relationship that's referred to there  
3 between Soilworks and Polar Supply?  
4 A. Can you ask me that again, please?  
5 Q. Yes. Is the business relationship that's  
6 referred to in Paragraph 29 the relationship between  
7 Soilworks and Polar Supply?  
8 A. I think that would certainly fall here.  
9 Q. And what led to that alleged interference is  
10 the letter to Polar Supply that you later on then  
11 indemnify Polar Supply for, correct?  
12 MR. DOSEK: Object to the form.  
13 A. Can you ask it again, please?  
14 Q. BY MR. SKERIOTIS: Sure. I didn't ask it very  
15 well, that's a fair question. The interference that's  
16 mentioned here is the letter that Midwest drafted and  
17 sent to Polar Supply, correct?  
18 A. I would assume that that letter constitutes  
19 interference.  
20 Q. And that's interference that's referenced in  
21 Paragraph 29, correct, of your Complaint?  
22 A. I believe so.  
23 Q. And I take it, then, that it's your position  
24 that Midwest tried to interfere with that relationship  
25 to gain Polar Supply as a customer, correct? Is that

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1 your allegation?  
2 A. I think that could be part of it.  
3 Q. And in fact Midwest was not successful,  
4 though, in getting Polar Supply to be its customer,  
5 correct?  
6 MR. DOSEK: Object to form, foundation.  
7 A. I hope Midwest doesn't do business with Polar  
8 Supply.  
9 Q. BY MR. SKERIOTIS: And as far as you know they  
10 don't do business with Polar Supply, correct?  
11 A. I don't have any knowledge of that.  
12 Q. In other words you don't have any knowledge  
13 that Midwest does business with Polar Supply, correct?  
14 A. No, I don't.  
15 Q. Can you tell me how you have been damaged by  
16 this interference between you and Polar Supply?  
17 A. One of the things would be the fact that we  
18 didn't make any sales during the time between the  
19 letter being received by Polar and the letter provided  
20 from us from our attorneys committing to  
21 indemnification of them. But who knows how far that  
22 goes in terms of their -- there is many different  
23 pieces of this.  
24 Q. But it's true you haven't to your knowledge  
25 lost any sales pursuant to the letter sent by Midwest

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1 to Polar Supply, correct?  
2 A. The letter was very timely and because of a  
3 project that was taking place, and to the best of my  
4 recollection that project was lost to Midwest, actually  
5 to Nana Supply or Nana Pacific who markets Midwest's  
6 materials. So I believe that we directly lost an ADOT  
7 project, one more reference, one more plot, one more  
8 sale, because of that.  
9 Q. Are you saying, then, that Polar Supply did  
10 not bid on that project because of Midwest's letter to  
11 Polar Supply?  
12 A. I don't want to speak on their behalf, it's  
13 best that you talk to them directly about that.  
14 Q. Do you know if they bid on a project during  
15 this time period that we are speaking of between the  
16 letter and the indemnification?  
17 A. I am fairly certain.  
18 Q. That they did or did not?  
19 A. I am fairly certain that during this time  
20 there was a bid that they were involved in. I don't  
21 know if it was bid or not bid, I don't know.  
22 Q. Other than that, though, there is no other  
23 damage that you know of caused by the letter to Polar  
24 Supply from Midwest?  
25 A. I certainly could not say that for sure.

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1 mean that's an overexaggeration, but the point is is  
2 that synthetic isoalkane covers a lot of different  
3 things and it can be defined in many different ways.  
4 Again, it's too broad.  
5 Q. Do you think it could be defined in a way such  
6 that Durasoil would be interpreted to have a synthetic  
7 isoalkane?  
8 A. Here is what I would love to see, I would love  
9 to see that mineral oil is or is not with CAS number  
10 such and such, does or does not meet the terms of being  
11 what Midwest is defining as a synthetic isoalkane.  
12 That's the kind of stuff I would love to be able to  
13 look at, but in fact we have to infer what they are  
14 meaning by these broad terms and that's not easy.  
15 Q. So back to my question though, do you think  
16 that there is a definition of synthetic isoalkane  
17 wherein Durasoil would meet having a synthetic  
18 isoalkane?  
19 A. I think it's possible. For example, if  
20 mineral oil is a synthetic isoalkane or base oil that  
21 we describe in our ingredient list are considered as a  
22 synthetic isoalkane, then it is what it is.  
23 Q. Well, let me ask you is mineral oil an  
24 isoalkane?  
25 A. I don't know.

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1 Q. Do you know is mineral oil synthetic?  
2 A. I know mineral oil is refined.  
3 Q. But do you know if it is synthetic?  
4 A. It depends on how you are defining  
5 "synthetic," and if you are defining synthetic as  
6 something that is not natural, then I would certainly  
7 classify it as synthetic.  
8 Q. Because you believe mineral oil is not  
9 natural?  
10 A. I believe so.  
11 Q. So in other words is your definition of  
12 "synthetic" just anything that's not natural?  
13 A. Mineral oil to the best of my knowledge cannot  
14 be obtained in the form that we use it today without  
15 going through some sort of process.  
16 Q. But my question was a little bit broader than  
17 that. Is your definition of "synthetic" anything  
18 that's not natural?  
19 A. I think that could be a good definition.  
20 Q. Why don't you just tell me what is your  
21 definition of "synthetic." I kind of put words in your  
22 mouth, I didn't mean to do that.  
23 A. I think it could be described as something  
24 that's not natural or naturally occurring.  
25 Q. Not naturally occurring?

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1 A. Sure.  
2 Q. Because you said naturally occurring, I just  
3 want to make sure you are talking about not naturally  
4 occurring.  
5 Have you tested Durasoil to find out if  
6 it has an isoalkane?  
7 A. Again, I don't know what an isoalkane is. I  
8 don't know what you guys are trying to classify as an  
9 isoalkane.  
10 Q. But let me ask you this, we have determined  
11 that you are not a chemist, correct?  
12 A. Again, yes.  
13 Q. Have you turned to a chemist to find out if  
14 they can determine whether or not Durasoil has an  
15 isoalkane?  
16 A. I have been advised by people, yes.  
17 Q. Who have you been advised by?  
18 A. Randy McFarlane.  
19 Q. Who is Randy?  
20 A. He is with ConocoPhillips.  
21 Q. What has Randy told you?  
22 A. Randy helped clarify his take on what these  
23 binders and acids and esters and thermoplastics, he  
24 helped paint his knowledge and his picture of what he  
25 believes that might be.

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1 Q. Did Randy help you in drafting these two  
2 pages?  
3 A. I asked him questions relating to what you  
4 have in your patent so that I could answer this.  
5 Q. So he helped you draft or he helped you with  
6 your drafting of these two pages, correct? Based on  
7 the conversations you had with him you drafted these  
8 two pages?  
9 A. Based on our conversation he helped me fill  
10 in, you know, fill in the blanks that I needed to go  
11 and make this document.  
12 Q. Okay, fair enough.  
13 A. But he did not sit down and help me put this  
14 together.  
15 Q. And who is Randy McFarlane?  
16 A. He is with ConocoPhillips and he is -- I  
17 believe he's one of the salesmen. He is one of my main  
18 points of contact.  
19 Q. So did you ask Randy if Durasoil has an  
20 isoalkane in it?  
21 A. I did.  
22 Q. And what did he say?  
23 A. He said that if a synthetic isoalkane -- and I  
24 am paraphrasing.  
25 Q. Sure.

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